

LEE WAH BANK LTD.

v.

CHI LIUNG HOLDINGS SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR

VOHRAH J

[ORIGINATING SUMMONS NO. F 836 OF 1982]

13 OCTOBER 1983

CONTRACT: *Sale and purchase agreement - Declaration of rights of parties - Condition precedent - Interpretation of contract clauses.*

By a sale and purchase agreement the plaintiff agreed to purchase from the defendant business premises consisting of a shell unit for use as a branch office. To facilitate business the plaintiff intended to install an automated teller machine and a stainless steel sign logo and signboard with spot lights on the exterior face of the wall of the premises. Notice of purchaser's intentions was given to the defendant who agreed to the plaintiff's proposal subject to the plaintiff paying a rental of RM20,000 per annum and a deposit of RM5,000. The plaintiff objected citing Sections 5.14 and 7.04 of the agreement and proceeded to put up the signboards and logo and had made a rectangular hole in the wall for the installation of the teller machine. The defendant contended that the plaintiff had only purchased the shell unit and therefore had no legal rights to the exterior of the premises and that the sale and purchase agreement was only a conditional agreement pursuant to Section 6.03 subject to the issue of a subsidiary title and pending the registration of the transfer of title and until then the plaintiff was only a tenant-at-will whose rights were restricted.

Held:

[1] That Section 6.03 was a term of the contract and not a condition precedent. Therefore the plaintiff was entitled to a declaratory decree under O. 5 r. 4 of the Rules of the High Court.

[2] That Sections 5.14 and 6.06 of the agreement applied to the installation of the teller machine. The making of a rectangular hole through the wall which forms part of the original structure is an alteration of the form and structure of the wall of the premises and therefore requires the consent of the vendor.

[3] The expression "competent authorities" in Section 6.06 refers to the "vendor" and "appropriate authority". Therefore the plaintiff is not entitled to the declaration sought in terms of prayer (a) that is that the consent of the defendant be obtained before "any addition of other work to be done in or about" the premises.

[4] Pursuant to the aforesaid the plaintiff must also seek the approval of the defendant before the installation, affixing and exhibiting of the plaintiff's signboard or logo with neon lights or spot lights on the exterior works of the premises in accordance with Section 7.04 of the agreement.

[Application dismissed with costs.]

Cases referred to:

Bickmore v. Dimmer [1903] Ch D 158

Legislation referred to:

Rules of the High Court 1980, O. 5 r. 4(2)

- a* For the plaintiff - P. Royan; M/s. Shook Lin & Bok
For the defendant - Rahim Noor (G.T. Rajan with him); M/s. G.T. Rajan & Co.

JUDGMENT

Vohrah J:

- b* This is an application by way of an originating summons (see enclosure 2) under O. 5 r. 4(2) of the Rules of the High Court 1980 for a declaration of the rights of two parties under the terms of a written contract. The only affidavits which I have been asked to consider are Enclosures 1, 4, 18 and 20 and the exhibits I have had to refer to are those exhibited to enclosure 1.
- c* By a sale and purchase agreement dated 17 November 1980 (see Exh. CSS1), Lee Wah Bank Limited ("the purchaser") agreed to purchase from Chi Liung Holdings Sdn. Bhd. ("the vendor") business premises consisting of a shell unit measuring 3,500 square feet on the ground floor and 1,500 square feet on the first floor ("the premises") of a building complex ("the Plaza").
- d* The purchaser is using the premises for its banking business as a branch office and to facilitate this business it proposes to install an automated teller machine in the wall of the premises facing the corridor of the main entrance to the Plaza, a stainless steel sign logo and signboard beside and above the teller machine on the exterior face of the wall with spot lights to illuminate the teller machine and the signs, a neon sign of the purchaser's logo at the exterior of the western parapet wall of the premises and signboards on and above the glass panel surrounding the premises with sufficient spot lights to illuminate the signboards.
- e* Notice of the purchaser's proposal was given to the vendor by a letter dated 5 April 1982 (see Exh. CSS2) and the vendor by its reply of 6 May 1982 (see Exh. CSS3) agreed to the purchaser's proposed installations subject to the purchaser paying a rental of RM20,000 per annum and a deposit of RM5,000. On 5 August 1982 the purchaser's solicitors wrote to the vendor's solicitors (see Exh. CSS4) informing them, in essence, that under Section 5.14 of the agreement the vendor had no right to impose a rental as a condition for the vendor's consent to the installation of the teller machine; nor was the approval of the vendor necessary
- f* under Section 7.04 of the agreement for the installation of the signboard and logo. The reply of the vendor's solicitors dated 13 August 1982 (see Exh. CSS5) indicated that any unilateral act on the part of the purchaser to exhibit the signs and to install the teller machine would be resisted. Nevertheless signboards on and above the glass panel surrounding the premises had been installed whilst the neon sign of the purchaser's logo on the exterior of the western parapet wall which had also been installed had now been removed following an "incident".
- g* The teller machine had not been installed although a rectangular hole for its installation had been made through the wall of the premises.
- h* The vendor contends that the purchaser under the agreement bought only a shell unit and therefore has no legal rights to the exterior of the premises and accordingly has no right to make the installations and alterations it proposes and that under Section 5.11 of the agreement the vendor has the "absolute right to impose any restrictions for whatever reason" because the vendor has plans to use the exterior of the premises for, *inter alia*, commercial advertisements for rental and "any interference with such plans would affect the (vendor's) interest adversely." The vendor further contends that under Section 6.03 the agreement is only a conditional agreement and that the sale of the premises is subject to the issue of a subsidiary title and pending the registration of the transfer of this title to the purchaser, the purchaser has no right to claim any privilege under the agreement and is only a tenant-at-will whose rights are accordingly restricted.
- i*

For the sake of convenience I shall take the second contention first. The provisions of Section 6.03 read:

Section 6.03 **Transfer of Title to Purchaser.** Provided that the purchaser shall have paid to the vendor the full purchase price and all other moneys (if any) payable hereunder and shall have duly observed and performed the various terms, conditions and stipulations herein to be observed and performed by him, the vendor shall within fourteen (14) days either of the date of such payment as aforesaid or of the date of the issue of the relevant separate subsidiary title (whichever shall be the later) execute a valid and registrable transfer of the same in favour of the purchaser or the purchaser's nominee or nominees, free from all encumbrances whatsoever PROVIDED that prior to the transfer herein mentioned the vendor shall be entitled, subject to the prior written consent of the purchaser and the first chargee, Lee Wah Bank Ltd., to create further charges over the premises to any financier on such terms and conditions as the vendor and the financier may agree upon, and such consent shall not be withheld unreasonably.

These provisions clearly relate, in my view, to the simple question as to when the transfer of the subsidiary title to the purchaser is to be effected. I do not accept the contention of Counsel for the vendor that they make the agreement a conditional contract and confer no proprietary rights upon the purchaser to entitle it to a declaratory decree under O. 5 r. 4 until the subsidiary title has been transferred to the purchaser and registered. I think a clear distinction must be drawn between a condition precedent and a term and this distinction has been very aptly drawn in the case of *Ho Kok Cheong Sdn. Bhd. & Anor. v. Lim Kay Tiong & Ors.* [1979] 224 where Lee Hun Hoe CJ (Borneo) has this to say at page 229:

The question whether the contract is conditional or not depends entirely on the interpretation of the sale agreement. The 'conditions' agreed by the parties were nothing more than the terms of the contract. The fact that a 'condition' is a term of a contract does not make it a conditional contract.

To borrow the words of Buckley LJ (quoted at the same page) Section 6.03:

is not, in my judgment, a condition precedent to the contract at all, it is part of the terms of the contract. You may call it a condition if you please, but it does not make it a condition precedent to the existence of a contract.

Accordingly I hold that it is perfectly in order for the purchaser to bring these proceedings under O. 5 r. 4(2) of the Rules of the High Court 1980.

I now go to the substantive arguments relating to the rights of the parties.

Reading the agreement as a whole I am of the view that the provisions of Sections 5.14 and 6.06 apply specifically to the question of the installation of the teller machine. They read as follows:

Section 5.14 **Alterations**

The purchaser shall not make any alterations or execute any improvements to the premises without the consent of the relevant local authority and the vendor PROVIDED always that the vendor shall not withhold its consent unreasonably.

Section 6.06 **Deviation of Plans**

If during the course of construction of the premises the purchaser shall require any deviation to be made of the specifications or if it shall require any addition or other work to be done in or about the premises the vendor shall on the written request of the purchaser and subject to the approval of the vendor and the appropriate authority carry out such work PROVIDED that the extra cost of such work including the vendor's architect's fees and supervision fees

- a** are paid to the vendor within (14) days from the date of vendor's request for payment before such work is carried out. Notwithstanding anything herein this section contained, the purchaser shall be at liberty, subject to the approvals by the competent authorities, to carry out such alterations and installations as may be required at the purchaser's own cost to enable the premises to be used as a bank. In the event that the purchaser shall engage its own contractors and/or workmen to execute such alterations and installations, no fees or charges shall be payable to the vendor.
- b** Having regard to everyday parlance I do not think it can be disputed that making a rectangular hole through the wall of the premises facing the corridor of the main entrance to the Plaza *per se* involves an alteration to the premises within the meaning of Section 5.14. Counsel for the purchaser has referred to the case of *Bickmore v. Dimmer* [1903] Ch D 158 for the meaning of the word "alteration" as judicially defined. In that case the lease of a
- c** shop occupied by a jeweller and watchmaker contained a covenant by the lessee that he would not "make or suffer to be made any alteration to the said premises, except as herein expressly PROVIDED, without the consent in writing of the lessors first had and obtained." It was held by the Court of Appeal that some limitation must be placed on the words of the covenant and that the erection of a large clock, affixed without the consent of the lessor to the exterior of the wall of the house by means of bolts driven into it, was not a breach of
- d** covenant because the word "alteration" should be limited to something which alters the form or structure of the building. Vaughan Williams LJ said at page 166:
- We have to construe the word "alteration" in this covenant. I feel very strongly that it would be really impossible to hold that every addition to the premises, whether it does or does not alter the form or structure of the premises, is within the meaning of the word "alteration" in the covenant. The result of so holding would be this tenant carrying on the
- e** business of a watchmaker and jeweller would not be able to put up a fixed blind on the outside of the window of his shop, or to put a lamp outside in front of his main door, or even to place a knocker upon the door. That would really be an impossible construction.
- His Lordship went on to say at page 167:
- In my opinion, the words "alteration to the said premises" apply only to alterations which would affect the form or structure of the premises.
- f** And Cozens-Hardy LJ said at page 168:
- It is plain that some limitation must be put on the word "alteration". It could not apply to a change of the paper of a room, to the putting up of gas-bracket, or the fixing of an electric bell, though in fixing it some holes would be made in the wall. The argument comes in substance to this, that the abstraction of a few cubic inches from the wall of the house is an "alteration"
- g** within the meaning of the covenant. I cannot take that view. In my opinion the covenant ought to be limited in the way put by my brother Vaughan William - that is, it should be limited to something which alters the form or structure of the building.
- In my view the making of a rectangular hole through the wall of the premises for the purpose of fitting an automated teller machine in the hole obviously alters the form and structure of
- h** the wall of the premises. It is not just a case of the teller machine being bolted onto the inside wall of purchaser's premises but it is a case of a hole being made right through the wall which already forms part of the original structure of the entire Plaza in order to accommodate the teller machine. Further the teller machine once emplaced would undoubtedly alter the whole appearance of the wall of which the public will have full view when they use the corridor of the main entrance which the teller machine will face. Accordingly I am of the
- i** opinion that the proposed installation of the teller machine requires the consent of the vendor under Section 5.14. Whether the vendor's refusal to allow installation except upon payment

of a rental and deposit is unreasonable withholding of its consent is a matter which is not for consideration in the present application.

I next deal with the application of the provisions of Section 6.06 to the installation of the teller machine. Again having regard to everyday parlance I do not think it can be disputed that installing a teller machine which further involves patching up the jagged edges of the hole and capping of these edges with a stainless steel frame entails additional work within the meaning of the first sentence of Section 6.06 requiring “any addition of other work to be done in or about” the premises. The provisions of this particular sentence relate to deviation or additional works which would be carried out by the vendor obviously with its approval and that of the appropriate authority which has been defined as “any governmental, semi or quasi-governmental and/or statutory department, agencies or bodies.” The provisions of the second sentence of Section 6.06, with which we are more directly concerned, relate to alteration and installation works which are to be carried out by the purchaser but subject to the approval of the “competent authorities”, an expression which has not been defined. Does this expression with a small “c” and a small “a” mean the two entities referred to in the first sentence or does it mean some institutionalised or professional entity as suggested by Counsel for the purchaser? Having regard to the reference in the first sentence of Section 6.06 to the two entities “vendor” and “appropriate authority” I am of the opinion that it is not unreasonable to conclude that what was intended by the parties by the expression “competent authorities” in the second sentence relating to similar types of additional works entailing some deviation from the plans where these works are to be undertaken by the purchaser itself must be the same two entities whose prior approval is required. In the event I hold that the purchaser is not entitled to the declaration which is sought in terms of prayer (a) of its application.

I turn finally to the question of the installation, affixing and exhibiting of the purchaser’s signboard or logo with neon lights or spot light on the exterior walls of premises and on the glass panel surrounding the premises without any approval from the vendor and without having to pay any rental to the vendor. The special provision in the agreement relating to signboards and logos is Section 7.04 which reads:

Section 7.04 Signboard and Logo

Subject to the approval of competent authorities the purchaser shall be entitled to affix and/or exhibit only on the exterior and interior of the premises the purchaser’s signboard and logo, and not on any other part of the centre.

In view of my finding as to the meaning of the expression “competent authorities” in Section 6.06 I think *a fortiori* it is only reasonable that the parties must have intended the same meaning as that in Section 6.06 to be attached to the expression in a provision which follows in the immediately succeeding section of the same agreement. Accordingly, I am of the opinion that the approval of the vendor apart from that of the appropriate authority must first be obtained before the purchaser can install its signboard and logo on the exterior walls of its premises and in the result I hold that the purchaser is also not entitled to the declaration which is sought in terms of the prayer (b) of its application.

The application is therefore dismissed with costs.

Also found at [1984] 1 CLJ 32